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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

THE BOEING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
ex rel. KEVIN G. KELLY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Date: January 14, 1994

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Pursuant to Rule 37.2 of the rules of this Court, the Washington Legal Foundation respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petitioner. Petitioner has consented to the filing of this brief; however, the respondent has not provided consent.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. with over 100,000 members and supporters nationwide. WLF devotes a substantial portion of its resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts dealing with separation of powers issues, standing, and similar issues raised in this case. *See, e.g., Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989); *United States*

ex rel. Kreindler & Kreindler v. United Technologies Corporation, 985 F.2d 1148 (2d Cir. 1993).

In addition, WLF programs, including its Legal Studies Division, also address civil justice reform, such as the need to reduce the litigation explosion driven to a large extent by the award of excessive attorneys' fees. The *qui tam* provisions of the False Claims Act also encourage frivolous lawsuits which are not in the public interest.

WLF can bring a broader perspective to this case than that presented by the parties, and believe its participation at this stage of the proceedings will assist the Court in determining whether to grant review.

Accordingly, WLF respectfully requests that it be granted leave to file the annexed brief.

Respectfully submitted,

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QUESTION PRESENTED

The Washington Legal Foundation will address the following questions:

1. Does the *qui tam* provisions of the False Claims Act impermissibly infringe upon the Executive Branch's Article II authority by allowing *qui tam* relators to conduct litigation on behalf of the United States, when the United States declines to intervene in the action, and therefore violate the Separation of Powers Doctrine?

2. Does Congress' broad delegation of litigation authority under the *qui tam* provisions of the False Claims Act to an unspecified class of relators who control the initiation and conduct of litigation on behalf of the United States, when the United States declines to intervene in the action, violates the Appointments Clause of the United States Constitution?

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The interest of the Washington Legal Foundation is set out its Motion for Leave to File Brief of *Amicus Curiae* attached hereto.

SUMMARY OF ARGUMENT

1. The legislative history and language of the *qui tam* provisions of the False Claims Act ("FCA") make it clear that Congress sought to infringe upon the primary Executive function of the initiation and conduct of the litigation of government rights, and that Congress' actions are a diffusion of the Appointments Clause. Members of

both Houses of Congress disapproved of the Executive's use of discretion in enforcing the FCA. Accordingly, Congress granted unfettered control of the decision to enforce government rights to private individuals. Further, Congress placed almost no limits on who qualifies as a relator capable of enforcing those rights, bypassing the need for appointment, thus diffusing control over the initiation and conduct of the litigation of government rights.

2. The *qui tam* provisions of the FCA violate the Separation of Powers Doctrine found throughout the Constitution. The powers given to *qui tam* relators divest the Executive Branch of its Constitutional responsibility to initiate and conduct the litigation of government rights. The Executive's lack of control over all aspects of *qui tam* litigation violates the Doctrine by placing such power in self-appointed individuals who lack the credentials to carry out Executive duties.

3. The *qui tam* provisions also violate the Appointments Clause. Art. 2, sec. 2, cl. 2. Under the FCA, *qui tam* relators exercise significant authority and have primary responsibility for initiating and conducting litigation of government rights. As such, the substance of the relator's authority and responsibility qualify them as officers. Notwithstanding their lack of salary, specified term or formal appointment, relators are officers, not lesser functionaries. Further, Congress' broad appointment of relators diffuses the appointment power.

REASONS FOR GRANTING THE WRIT

I. THE LEGISLATIVE HISTORY AND LANGUAGE OF THE *QUI TAM* PROVISIONS SHOW CONGRESSIONAL INFRINGEMENT

The critical inquiry presented by the *qui tam* provisions of the False Claims Act (FCA"), 31 U.S.C. §§ 3729, *et seq.*, asks which department of the federal government possesses *control* over the initiation and conduct of the

litigation of government rights. Under the language of Article II and the Separation of Powers Doctrine, the Constitution places control of these responsibilities solely with the Executive Branch. Further, the Appointments Clause of Article II specifies the manner of appointment of officers of the United States, including those who control the discretion for the initiation and conduct of litigation on behalf of the United States.

Contrary to the Constitution, the FCA permits *qui tam* relators to appoint themselves and then control the enforcement of the FCA in prosecuting fraud claims for the Government. Congress' incursion into the President's zone of control must not be allowed, as it violates both the Separation of Powers Doctrine and the Appointments Clause, thereby threatening the structure of the federal government as set forth in the Constitution.

A. The Legislative History Of The FCA

The legislative history of the 1986 amendments to the FCA clearly expresses Congress' dissatisfaction with the Executive Branch's discretion to initiate and conduct FCA actions. Accordingly, Congress improperly shifted control of these actions from the Executive to a statutory-created class of self-appointed private individuals.

For instance, the Senate Judiciary Committee's Report on the 1986 amendments to the FCA states that their purpose was to boost relator suits to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." *Report on 1986 Amendments to False Claims Act, Senate Judiciary Committee,* S. Rep. No. 99-345, 99th Cong., 2d Sess. 24 (1986) (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266 [hereinafter "Senate Report"]. The Committee's intent with the amendments was to "encourage more private enforcement suits." Senate Report at 23-24. The Committee gave individuals enforcement power to counter lack of confidence in "the Government's ability to remedy [fraud]," *id.* at 25, and to act "as a check" on the

Executive's unacceptable exercise of discretion in not pursuing fraud. *Id.* at 25-26.

More telling of legislative arrogation are the statements of Senator Charles Grassley, one of the principal sponsors of the 1986 amendments. Senator Grassley, in introducing the amendments, stated that in "too many cases" the Government "was not willing to adequately protect" the public fisc. 131 Cong. Rec. 22,322 (1985). The Senator questioned why the "Government bureaucracy [was] unwilling to guard against or aggressively punish fraud." *Id.*

Similar sentiment was expressed in the House of Representatives. House co-sponsor Congressman Bedell stated that the Executive Branch was not interested in prosecuting fraud "for political reasons." 132 Cong. Rec. H6483 (daily ed. Sept. 9, 1986). Congressman Berman, another co-sponsor, bluntly campaigned for removal of Executive control over FCA suits to "ensure that the case is effectively prosecuted on its merits." 132 Cong. Rec. H6474-02 (daily ed. Sept. 9, 1986). The Congressman suggested that the Justice Department "has not done an acceptable job of prosecuting defense contractor fraud." *Id.* Congressman Berman advocated passage of the amendments to remove Executive influence and directly "deputize ready and able people who have knowledge of fraud against the government." 132 Cong. Rec. H9382-03 (daily ed. Oct. 7, 1986). Thus, Congress's intent in amending the FCA was to seize control of the Executive's power to initiate and conduct litigation and shift these responsibilities to private individuals.[1]

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[1] Courts examining *qui tam* actions have recognized that private participation in enforcement actions is unlawful if it is a "subterfuge for Congressional control." *See United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615 (C.D. Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1095 (C.D. Cal. 1989).

What is significant in these statements is the absence of any implication that the Executive was unable to adequately enforce the FCA and that "help" was needed. Rather, the amendments plainly were the product of the Legislative Branch's discontent with the Executive Branch's exercise of its discretion to initiate and conduct litigation under the FCA.

B. The Language Of The *Qui Tam* Provisions Of The FCA

The language of the *qui tam* provisions clearly express Congressional intent to strip the Executive Branch's authority to initiate and conduct FCA actions. Under the *qui tam* provisions of the FCA, private individuals are authorized to "bring a civil action for a violation of [the Act] for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). The complaint is served on the government, but not the defendant, and remains sealed for sixty days while the government investigates the case to determine whether to intervene. *Id.* § 3730(b)(2). If the government elects to proceed with the litigation, it has "the primary responsibility for prosecuting the action"; however, the relator remains a party, and is entitled to request a hearing to challenge a government decision to dismiss or settle a case. *See id.* § 3730(c).[2]

However, when the government declines to intervene the FCA expressly provides that the *relator* "shall have the right to conduct the action." *Id.* § 3730(c)(3). While the government retains the right to seek intervention at a later point in the litigation, it may do so only upon a showing of good cause, and the government cannot "limit the status and rights of the relator." *Id.* This provision effectively

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[2] Thus, even when the Executive intervenes in a *qui tam* action, its ability to settle or dismiss a case is severely curtailed. *See, e.g., Gravitt v. General Elec. Co.*, 680 F. Supp. 1162 (S.D. Ohio), *appeal dismissed mem.*, 848 F.2d 190 (6th Cir.), *cert. denied*, 488 U.S. 901 (1988) (permitting successful relator to challenge settlement reached between government and defendant) (discussed more fully *infra*).

denies the Executive the power to dismiss an action, because dismissal would limit the relator's status and rights. Moreover, it also denies the government the right to intervene later to control the action.

Finally, the *qui tam* process places few limitations on those who may be relators. 31 U.S.C. § 3730(b)(1) permits "a person" to bring a *qui tam* action under the FCA. The term "person" is interpreted broadly, including even business and governmental entities. Senate Report at 8 (citations omitted).

II. THE FCA'S DEPRIVATION OF EXECUTIVE CONTROL OF THE INITIATION AND CONDUCT OF LITIGATION OF GOVERNMENT RIGHTS VIOLATES THE SEPARATION OF POWERS DOCTRINE

A. Separation Of Powers

The Separation of Powers Doctrine distributes power among the three branches of government to "protect the liberty and security of the governed." *Metropolitan Washington Airports Auth. v. Citizens For The Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2310 (1991). Although not specifically enumerated in the Constitution, the doctrine is recognized implicitly by the organization of the first three Articles and their vesting clauses. The separation of powers among the coordinate branches of government is not absolute: a system of checks and balances exists to prevent tyranny, establish an effective government, and preclude the encroachment or arrogation of one branch by another. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976); *see also Mistretta v. United States*, 488 U.S. 361, 381-82 (1989).

Separation of Powers, shared through a checks and balances scheme, clearly contemplates three fundamental principles regarding the function of each coordinate branch. First, certain primary constitutional functions exist that are essential to the nature and operation of a particular

branch: A branch may not delegate such functions to another nor may another interfere with, or supervise, those functions. Second, in addition to its primary constitutional functions, each branch may exercise functions that encroach on the functions of other branches *if* such incursions are *mandated expressly* by the system of checks and balances. Third, each branch may exercise functions that encroach on the functions of other branches *if* these functions are necessary and incidental to the exercise of its primary constitutional function, and, of course, do not interfere with another branch's primary Constitutional function. *Buckley*, *supra* at 121-22 (citing and quoting *Hampton & Co. v. United States*, 276 U.S. 394 (1928)). Thus, Congress is given the responsibility to create laws, and the President cannot perform these primary legislative functions. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Similarly, the President is given the responsibility to enforce the laws or appoint agents charged with the enforcement of laws, and Congress cannot perform these primary executive functions. *Buckley, supra* at 123-24; *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928).

B. Enforcement Of Government Rights Is A Primary Executive Function

Under the Separation of Powers Doctrine, the duty to prosecute violations of government rights is placed with the Executive. This duty is absolute and represents one of the Executive's primary constitutional functions. Thus, *any* divestiture of this duty from the Executive violates the Doctrine and is unconstitutional.

The Constitution specifically dictates that the Executive, not Congress, has the responsibility to "take Care that the Laws be faithfully executed . . . ." U.S. Const., Art. II, sec. 3; *Buckley*, *supra* at 138. The prosecution of cases to enforce government rights is, and always has been, a primary executive function. *United States v. Nixon*, 418 U.S. 683, 693 (1974). ("[T]he Executive Branch has exclusive authority and absolute discretion to decide

whether to prosecute a case . . . .") Transfer of the law enforcement power from the Executive to another entity is an unconstitutional invasion of the Executive's primary constitutional function. *See Springer*, *supra* at 202. *See also Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (power *not* to prosecute or enforce laws is integral part of executive constitutional duty to "take Care that the Laws be faithfully executed").[3]

The demands of operating a modern government necessitate that law enforcement be diffused within the Executive Branch. For example, Executive agencies often perform administrative enforcement. However, the Executive Branch retains control over civil and criminal enforcement.[4] All "formal" Executive administrative agencies defer to the responsibility of the Attorney General and the Justice Department to conduct the litigation on behalf of the United States. Generally, even "independent" agencies are represented in court by the Justice Department. *See, e.g., Interstate Commerce Commission v. Southern Railway Co.*, 543 F.2d 534, 536-37 and n.2 (5th Cir. 1976). In those rare instances when an independent" agency brings suit in its own name, the Executive retains control over the enforcement of government interests through the selection of high-level

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[3] The "national fundamental law" inherent in the constitutional scheme mandates that the Executive possess the exclusive authority to decide whether to prosecute a case. Only the Executive can balance competing state interests, national security interests, and the interest for the just administration of the laws.

[4] By statute, unless otherwise authorized by law, all litigation in which the United States, an agency, or officer of the United States is a party is conducted and supervised by the Attorney General and the Department of Justice. 28 U.S.C. §§ 516, 519. *See United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458 (1869). In *Morrison v. Olson*, 478 U.S. 654 (1988), the most attenuated diffusion of Executive power approved by this Court, the decision to initiate and conduct litigation belonged absolutely with the Attorney General. *Morrison*, *supra* at 196.

agency personnel, the introduction of legislation, and the ability to reorganize the government.[5]

Independent counsel statutes such as the Ethics in Government Act ("EGA"), 28 U.S.C. §§ 591 *et seq.*, do not divest the Executive of control of the litigation and conduct of government rights. In *Morrison v. Olson*, 487 U.S. 654 (1988), this Court concluded that the EGA provisions for designating an independent counsel did not violate the Separation of Powers Doctrine as embodied in the Appointments Clause because of the control retained by the Executive.[6] The *Morrison* Court held that the Executive's power to remove the counsel, the power to initiate the appointment, or the requirement that the counsel abide by Justice Department policies established sufficient Executive control over the enforcement of government rights.[7]

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[5] *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

[6] It is plain from this Court's discussion in *Morrison* that to comply with the strictures of Article II there must be indicia of both appointment and control. Moreover, to the extent that the indicia for either is weak, the other must be correspondingly strong. In cases where the Attorney General declines to intervene, it is clear that no appointment occurs. When this fatal flaw is coupled with virtually non-existent indicia of control, the relator can meet no conceivable construction of *Morrison*.

[7] Overturning the *qui tam* provisions will not impact private attorney general statutes created by Congress for environmental and other types of litigation. In contrast to the *qui tam* provisions, these statutes vindicate private and *incidental* government rights. They do not divest the initiation and conduct of litigation of government rights from the Executive. Private attorney generals must show personal injury, not injury to the government, to establish standing. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137-38 (1992). Once the plaintiffs have advanced a sufficient interest to establish standing, they may assert the interest of the general public in support of their own equitable relief claims.

Nor will this Court's action on the *qui tam* provisions affect statutes which provide a bounty to private individuals who report fraud to the government. *See, e.g.*, 26 U.S.C. § 7623 (providing discretion

(continued...)

Finally, minor historical incidents cannot be used to refute the Executive's responsibility to retain *complete* control over the litigation and conduct of litigation of government rights. The Ninth Circuit has noted that prosecutorial functions need not *always* be undertaken by Executive Branch officials by examining the historical duties performed by prosecutors in the Constitution's early years. *See United States ex rel. Kelly v. Boeing*, ____ F.3d ____, (1993), Pet. App. 15a-16a. This narrow approach places too much reliance on rarely invoked early law enforcement practices.

In fact, prosecution in the Federalist period was almost always performed by executive officials. *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 249 (available on Lexis as 1989 *OLC LEXIS* 25, *69-*71).[8] The rare instances in which non-Executive officials conducted prosecution must be examined in the context of the time period. In the late 1700's, application of the Separation of Powers Doctrine and the checks and balances scheme was relatively new and subject to much initial confusion. These factors explain why "non-executive law enforcement functions would not have been immediately apparent," because it "did not bite hard enough for the Executive to recognize or resist it as an usurpation of its authority." *Id.* at *68. The change from a Monarchy to a Constitution caused many problems with the incorporation of English laws, institutions, and

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[7] (...continued)
to pay rewards to those reporting violations of tax laws). It is the government in such cases which determines whether the case has merits, determines the value of the information, enforces the laws, and chooses whether and how much to pay the private informer.

[8] The Office of Legal Counsel's opinion is a lengthy and well-reasoned opinion on the unconstitutionality of the FCA. It is no credit to the Attorney General's obligation of legal objectivity that he(she) has refused thus far, for plainly political reasons, to participate actively in any constitutional appeal of the FCA.

ideas.[9] Thus, minor historical variances do not negate the Executive's responsibility to retain *complete* control over the enforcement and prosecution of government rights.[10]

The *qui tam* provisions of the FCA are unconstitutional because they take a primary Executive function, initiating and conducting the litigation of government rights, away from the Executive Branch. The FCA allows Congress to withdraw power from a co-equal branch and assign that power to an entity with an artificial interest in the litigation. This arrogation and dilution of Executive authority violates the Doctrine and removes Government accountability for the enforcement of laws. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804-05 (1987); *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2638 (1991). Indeed, without authority to appoint or dismiss the relator, the Executive is prevented from accomplishing its constitutional function of prosecuting breaches of the law. *Nixon v. General Services Administration*, 433 U.S. 425, 443 (1977).

C. Even If The Enforcement Of Government Rights Is Not A Primary Executive Function, The FCA Is Unconstitutional

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[9] The Office of Legal Counsel's opinion presents federal criminal law as an example of early conduct regarding the implementation of the Constitution. "For the first six years after the Constitution was adopted, virtually all persons who considered the issue believed that the Constitution permitted a federal common law of crimes. . . . [People soon began] to appreciate that the federal common law of crimes was inconsistent with the new Constitution's vesting of the legislative power solely in Congress . . . . [The] exclusive vestings of power [in the Executive and Legislative] were innovations introduced by the Constitution, the full implications of which were only slowly perceived." 13 Op. Off. Legal Counsel 249 at n.19.

[10] The existence of *qui tam* statutes during the Federalist period cannot rescue the FCA from its constitutional defects. Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

Even if a determination is made that control of the Enforcement of government rights is not a primary Executive function, the *qui tam* provisions of the FCA still violate the Separation of Powers Doctrine by encroaching on the Executive's ability to conduct its Constitutionally assigned functions. In *Morrison v. Olson*, this Court advanced factors to consider when determining whether legislation which encroaches on the Executive's power is nonetheless incidental and necessary to the operation of legislative functions. This Court concluded that the EGA did not violate the Separation of Powers Doctrine, establishing indicia of control that permitted the appointment of the independent counsel to survive Article II scrutiny. These indicia of control are the Constitutional minima required by *Morrison* and the Doctrine. 487 U.S. at 696.[11]

In FCA actions where the Government declines to intervene, the Executive's power is most threatened with divestiture. For example, the Executive has absolutely no control over the initiation of the action. Control over the decision to sue or not to sue is one of the most fundamental powers a law enforcement authority possesses. *Heckler, supra* at 831. Allowing the *qui tam* relator to file suit without the permission or endorsement of the Executive Branch denies the Executive this primary enforcement power. Even if the Executive determines that a case is meritless or that it would prefer resolution

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[11] Justice Ginsburg, then Judge in the D.C. Circuit Court of Appeals, held that the EGA was constitutional because it did not transfer "an executive function to another branch nor order[ ] an undue displacement of executive prerogatives." *In re Sealed Case*, 838 F.2d 476, 518 (D.C. Cir. 1988) (Ginsburg, J. dissenting). The dissent carefully detailed how the Attorney General's ability to *control* prosecution through the appointment, supervision, and removal of the Independent Counsel allowed the EGA to pass constitutional muster under a separation of powers analysis advanced by either *Bowsher v. Synar*, 478 U.S. 714 (1986) or *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). Under the FCA, the Executive possesses none of the controls enunciated in *Morrison*.

without litigation, it is stripped of its ability to prevent the litigation from going forward. This stands in direct contrast to the statute at issue in *Morrison* which vests the authority for initiating litigation with the Attorney General.

Further, once the litigation is underway, the United States has no right whatsoever to control the relator's conduct of the case. Whereas the Attorney General under the EGA has the power to determine the scope of the Independent Counsel's jurisdiction, the government retains no such authority under the FCA. Nor does the FCA require, as does the EGA, that *qui tam* relators follow Department of Justice policies. The relator has absolutely no obligation to take into account the policies and concerns of the United States Government, and the government has no ability to impose its will on the relator. Moreover, in *Morrison*, this Court identified the power to remove an independent counsel as the most important control retained by the Attorney General. The FCA makes no such provision for removal of a relator. In fact, the thrust of the FCA is to guarantee the relator's participation regardless of the government's intervention. Consequently, *qui tam* relators are in no way held accountable to any official in the Executive Branch regarding the conduct of the litigation.

When the Government declines to intervene, it effectively loses its power to terminate the litigation. Although the Government may move to intervene later for good cause, the court is not required to allow intervention. *See* 31 U.S.C. § 3730(c)(3). The Government's intervention, if allowed at all, also must not limit the "status and rights" of the relator. *Id.*[12] The FCA effectively denies the Executive the primary power to

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[12] Under 31 U.S.C. § 3730(c)(3), the government does not possess *any* right to dismiss the case over a relator's objection. The FCA only allows the government the right to dismiss a case in 31 U.S.C. § 3730(c)(2)(A), not subsection (c)(3); 31 U.S.C. § 3730(c)(2) *assumes* that the government has intervened under 31 U.S.C. § 3730(b)(2) to prosecute the case alongside the relator.

resolve or dismiss a case purportedly brought on behalf of the United States.[13]

Thus, the *qui tam* provisions of the FCA are unconstitutional because the Executive fails to retain the level of control over the initiation and conduct of the litigation of government rights as required by *Morrison*. This dilution of Executive control is impermissible under the Separation of Powers Doctrine.

III. THE *QUI TAM* PROVISIONS VIOLATE THE APPOINTMENTS CLAUSE OF ARTICLE II

The Appointments Clause, Art. II, sec. 2, cl. 2[14] limits the government in two ways: it protects against the arrogation of one branch's power by another, and it prevents the diffusion of the appointment power. *Freytag*, *supra* at 2638.[15] Further, this Court has always strictly

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[13] This limitation on the government's ability to settle an action is illustrated most forcefully in *Gravitt*, *supra n.2*, in which the Government chose to intervene later in the action to settle the litigation with the defendant. The relator, however, was able to block that settlement. The case continued for several years with the relator and the Government often disagreeing on litigation strategy. Given the *Gravitt* court's restrictions on the Government's authority to dismiss or settle cases in which it has intervened, it is reasonable to assume that the Government has no right at all to resolve a case in which it has not intervened.

[14] The clause states "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[15] Unlike *Freytag*, which dealt with arrogation of the appointment power by a third party within government, this case involves arrogation of government power by private parties.

construed such explicit grants of power. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 485-88 (1989) (Kennedy, J., concurring).

Relators are not appointed in the manner prescribed by the Appointments Clause. If relators act as officers they must be so appointed. Construed strictly, the *qui tam* provisions of the FCA violate the explicit language and principles of the Clause, allowing the appointment of an unlimited number of officers, known as relators, to initiate and conduct litigation on behalf of the government.

A. Relators Act As Officers In Violation Of The Appointments Clause

In *Buckley*, this Court analyzed the provisions of the Federal Election Campaign Act, which empowered a federal commission to perform investigative, rulemaking and enforcement tasks. The *Buckley* Court stated that those exercising "significant authority" under federal law are "officers" under the Clause. 424 U.S. at 126. The *Buckley* Court found that the investigative and rulemaking powers granted to the commission by Congress were merely an aid of the legislative function, and thus comported with the Appointments Clause. However, the Court held that the enforcement provisions were constitutionally infirm because they granted Article II enforcement powers to an Article I entity. The Court reasoned:

> The Commission's enforcement power, *exemplified by its discretionary power to seek judicial relief*, is authority that cannot possibly be regarded as merely an aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."

Buckley, 424 U.S. at 138 (emphasis added). Therefore, the Court concluded:

> [T]hese provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.

Buckley, *supra* at 140.[16] *See also United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (Attorney General is officer in charge of the conduct of litigation "necessary to establish the rights of the Government"); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1869).

In the context of litigating government rights, the requirement for one to exercise "significant authority" to constitute an Appointments Clause violation does not arise in the maintenance or resolution of a suit. The key to Appointments Clause analysis in this context is determining whether an individual has the "discretionary power to seek judicial relief;" that is, does one have control over the *initiation* of litigation. The *qui tam* relator clearly has such control. It is the relator who decides to sue, which district court to sue in and what theories to sue on. As for *Buckley's* "primary responsibility" requirement, when the Government does not intervene, as in the instant case, the relator is the only party responsible for enforcing government rights. The relator is answerable to no one,

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[16] In *Morrison v. Olson* (discussed *supra*), 487 U.S. at 680-81, this Court acknowledged *Buckley* and concluded without discussion that the independent counsel appointed under the provisions of the EGA is an officer of the United States because the counsel is "not subject to the control or direction of any other executive, judicial, or legislative authority." *Buckley*, 424 U.S. at 126 n.162. These cases make it clear that individuals empowered to conduct litigation on behalf of the United States are officers subject to the Appointments Clause.

and is able to conduct litigation without Executive Branch control.[17]

The Ninth Circuit's *Boeing* decision ignores the relator's ability to control the litigation and instead makes two arguments: the relator's responsibility is limited to one case; and the court can limit the relator's actions.[18] *Boeing*, Pet. App. at 31a. However, limiting a prosecutor to one case is not dispositive. If so, the independent prosecutor in *Morrison* would not be an officer. Also, the court limitation of the relator, upon the motion of the government or the defendant, only applies *when the government intervenes* under 31 U.S.C. § 3730(b)(2), not when government intervention occurs under 31 U.S.C. § 3730(c). In the latter case, the court has no authority whatsoever to limit the relator's actions.

B. Relators Are Not Lesser Functionaries

The Ninth Circuit commented with approval on the district court's observation that the relators received no federal salary, no specified term, and are not appointed by Congress. Thus, relators are not officers, but lesser functionaries, [19] *Boeing,* Pet. App. at 31a (citing *Auffmordt*

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[17] However, unlike the EGA, here, the relator exercises *no* realistic independent discretion: he is motivated only to sue. He has not been "retained" as an independent prosecutor to make an objective judgment.

[18] Court imposition of its authority under the FCA does *not* alter the requirement for an officer to be appointed pursuant to the clause.

[19] In considering whether relators are officers or lesser functionaries, it is worth noting Justice Scalia's warning:

> If the mere fragmentation of executive responsibilities into small compartments suffices to render the heads of each of those compartments inferior officers, then Congress could deprive the President of the right to appoint his chief law enforcement officer by dividing

(continued...)

v. Hedden, 137 U.S. 310, 327 (1890)). However, it is necessary to look at the substance of the relator's authority, and not the form of the relator's position. The relator has absolute discretion to initiate and prosecute litigation of government rights.[20] In addition, the relator receives a statutory bounty when the case is successfully concluded as compensation for his actions. Finally, lack of Congressional appointment certainly does not prove that relators are not officers. Congress cannot appoint officers. *Buckley*, *supra* at 139 (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928)). Had Congress appointed relators in a traditional fashion, it clearly would have run afoul of the Constitution. Instead, Congress chose to allow relators to appoint themselves. This subterfuge cannot be sanctioned: "[w]hat cannot be done directly . . . cannot be accomplished indirectly by legislation which accomplishes the same result." *Fairbank v. United States*, 181 U.S. 283, 294 (1901) (and cases cited therein).

Lesser functionaries such as agents or employees exist in contrast to appointed officers. Agents are those authorized by another to act on his behalf and subject to his control. Restatement (Second) of Agency § 1 & cmt. e (1958); 2A C.J.S. Agency § 4. As commonly understood, an agent is one who, having no personal interest in the subject matter of his agency, acts for another, and does not profit from his activities except as to such compensation he may receive from his principal,

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[19] (...continued)
up the Attorney General's responsibilities among a number of "lesser" *functionaries*.

Morrison, 487 U.S. 654, 718 (1988) (Scalia, J., dissenting). This division of responsibilities has happened without a formal appointment. Whether the Attorney General approves of such diminution of authority is unimportant; it is unconstitutional.

[20] This is true even when, after investigation under § 3730(b)(2)-(4), the government has concluded that the relator's charges are without merit.

independently of the venture to which his agency relates." 2A C.J.S. Agency § 4. Furthermore, there can be no agency relationship unless the principal has some right of control over the actions of the agent. *Id.* at § 6. Finally, if there is a conflicting interest, the agent must subordinate his interests to those of the principal.

Relators cannot be agents of the Executive Branch. Neither the President nor the Attorney General has authorized them to act on behalf of the Executive. Relators have a personal, pecuniary interest in the enforcement of the FCA. Relators have exclusive control over the initiation and course of their "agency". Finally, relators can and often do place their interests in enforcing the FCA over those of the Executive.

C. The Lack Of Limitations On Who May Be A Relator Impermissibly Diffuses The Appointments Clause

As the Fourth Circuit noted, "Congress has let loose a posse of *ad hoc* deputies to uncover and prosecute frauds against the government." *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992) (Eleventh Amendment immunity was denied to state agency because the United States is the real party in interest in FCA *qui tam* actions). Such a grant of prosecutorial authority to an indeterminate class impermissibly diffuses the Executive's prosecutorial powers. In fact, the more widely its authority is distributed, the more diffuse becomes the Executive's ability to oversee and control those cases purportedly brought on behalf of the United States. The result is that which the Appointments Clause was intended to prevent. *Freytag*, 111 S. Ct. at 2638.

CONCLUSION

For the foregoing reasons, the Boeing Company's petition for writ of certiorari should be granted.

Respectfully submitted,

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